

STATE OF MICHIGAN
COURT OF APPEALS

JOHN P. CURIS and YVONNE CURIS,

Plaintiffs-Appellees,

v

ROBERT JOHNSTON, PHYLLIS JOHNSTON
and FIDUCIARY PLANNING, INC.,

Defendants-Appellants.

UNPUBLISHED

July 3, 2001

No. 220719

Oakland Circuit Court

LC No. 97-000609-CK

Before: Hoekstra, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendants appeal as of right from the judgment entered following an order granting plaintiffs summary disposition under MCR 2.116(C)(10). We affirm.

Defendants first argue that the trial court erred in granting plaintiffs' motion for summary disposition. We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Royce v Citizens Ins Co*, 219 Mich App 537, 540; 557 NW2d 144 (1996). When reviewing a motion under MCR 2.116(C)(10), we must consider the entire lower court record, including pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 75-76; 597 NW2d 517 (1999). Summary disposition is appropriate if the evidence shows that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

Plaintiffs' complaint alleged that defendants engaged in fraud, violated the Uniform Securities Act, MCL 451.501 *et seq.*, violated the Consumer Protection Act, MCL 445.901 *et seq.*, breached their contract with plaintiffs, breached the fiduciary duties owed to plaintiffs, and violated the federal Securities Act, 15 USC 77e, and the federal Securities Exchange Act, 15 USC 78j(b). In support of their motion for summary disposition, plaintiffs submitted and relied on numerous documents, including defendants' own admissions of material facts. Although defendants generally denied plaintiffs' allegations in their pleadings, the documentary evidence they submitted in opposition to plaintiffs' motion failed to establish the existence of any material fact. Instead, the documentary evidence submitted below establishes that plaintiffs are entitled to judgment as a matter of law.

The evidence indicates that defendant Robert Johnston's false statements regarding his status as a securities broker and representative of Phoenix Continental Corporation and the safety and security of plaintiffs' investment led plaintiffs to invest their money through defendants. The uncontroverted evidence also establishes that the promissory note at issue was a "security" under MCL 451.801(1) and 15 USC 77b(a)(1), the security was unregistered, and defendants Robert Johnston and Fiduciary Planning, Inc. sold the unregistered security by way of an untrue statement of material fact. In regard to defendant Phyllis Johnston, the evidence establishes that she was the sole shareholder, officer and director of Financial Services, Inc., which merged with defendant Financial Planning, Inc. Phyllis Johnston denies knowledge of wrongdoing with respect to the promissory note. However, we conclude, as a matter of law, that her denial is insufficient proof that she did not know or, through the exercise of reasonable care could not have known, of the circumstances surrounding the note given her status as president of the corporation, her ten-percent interest in PCC, her admission that she attended at least one PCC business meeting, and her prior position as a licensed broker. MCL 451.810(b). We conclude that the trial court properly granted summary disposition given that defendants failed to do more than rest on the denials in their pleadings, MCR 2.116(G)(4), and the evidence establishes that plaintiffs are entitled to judgment as a matter of law, *Smith, supra*.

Defendants next argue that the trial court abused its discretion when it awarded plaintiffs \$17,500 in attorney fees without affording defendants an evidentiary hearing regarding the reasonableness of the award. The record establishes that the parties agreed to the entry of the judgment awarding \$17,500 in fees instead of the \$27,000 in attorney fees plaintiffs initially requested. Because defendants explicitly waived their right to an evidentiary hearing before the trial court, we decline to address this unpreserved issue on appeal. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999); *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Brian K. Zahra